90-515

No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LOCKHEED SHIPBUILDING COMPANY,
Petitioner,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

and

WILBORN K. STEVENS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite mandatory language in the Longshore and Harbor Workers' Compensation Act ("Longshore Act") which has never been disturbed by Congress or the federal courts, the Court of Appeals was correct in expanding the remedy available to an employee receiving permanent scheduled disability compensation to also include permanent total disability compensation from the date of maximum improvement to the date employability is established by the Employer.

2. Whether the decision of the Court of Appeals, which rewrites the Longshore Act to include a new type of recovery, should be allowed to stand, given that it violates this Court's policy that the Longshore Act should be construed as written and changed only by Congress.

3. Whether the Court of Appeals' decision, which blurs the carefully drafted Congressional distinction between the types of recovery for scheduled and unscheduled injuries, should be reversed in light of this Court's holding that the character of the disability determines the method of compensation.

4. Whether the decision of the Court of Appeals which mandates, for the first time, that employers prove the employability of all employees who suffer scheduled injuries, alters the burden of proof, violates the policy of the Longshore Act of ensuring prompt and certain recovery of benefits, and greatly expands the costs of administration and benefits under the Longshore Act.

LIST OF PARTIES

The parties in No. 89-70224 before the Court of Appeals were Wilborn Stevens, as petitioner, and the Director, Office of Workers' Compensation Programs of the United States Department of Labor and Lockheed Shipbuilding Company* as respondents.

*Lockheed Shipbulding Company is a wholly owned subsidiary of Lockheed Corporation.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

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WILBORN K. STEVENS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lockheed Shipbuilding Company prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Ninth Circuit which awarded both permanent total disability compensation and scheduled injury permanent disability compensation.

OPINIONS BELOW

The Administrative Law Judge's Decision and Order, Order on Reconsideration and *sua sponte* Order on Reconsideration, 84-LHC-2730, are unreported. (Appendix C-E).

The Decision and Order of the Benefits Review Board, United States Department of Labor, is reported at 22 BRBS 155 (1989). (Appendix B).

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at _____ F.2d _____ (9th Cir. 1990) and at 23 BRBS 89 (CRT). (Appendix A).

JURISDICTION

The Court of Appeals' decision in this case was rendered on June 22, 1990. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTE

The relevant statute, 33 U.S.C. §908 (1984), is set forth in Appendix F.

STATEMENT OF THE CASE

This case involves the interpretation of the Section 8 of the Longshore Act, 33 U.S.C. §908 (Appendix F) concerning what benefits are available to an individual who suffers a permanent partial disability as a result of a scheduled injury under Section 8(c)(1-20).

The claimant, Wilborn Stevens, worked as a shipscaler for Petitioner, Lockheed Shipbuilding Company ("Lockheed") for five months prior to an injury on May 8, 1981. Claimant twisted his right elbow on that date.

At a hearing held before an Administrative Law Judge on December 16, 1985, Claimant agreed that he had a 20% permanent partial impairment based upon the loss of use of his arm under Section 8(c)(1). Claimant contended that the arm

impairment precluded him from returning to gainful employment and that he was entitled to permanent total disability compensation under Section 8(a). The Administrative Law Judge concluded that Claimant reached the point of maximum medical improvement on November 30, 1982. He further found that Claimant was able to perform alternative employment as of September 30, 1985 when a labor market survey was performed by Lockheed's vocational consultant. The Administrative Law Judge found Claimant to be temporarily totally disabled between the date of injury and the date of maximum medical improvement, November 30, 1982. Thereafter, Claimant was found to be entitled to permanent total disability compensation from the date of maximum medical improvement to the date that employability was demonstrated on September 29, 1985. The Administrative Law Judge also concluded that Lockheed was entitled to deduct the amount of benefits it had previously and voluntarily paid the Claimant for permanent partial disability, under the schedule, from the permanent total disability compensation award. (Appendix E).

Both Claimant and Lockheed petitioned the Administrative Law Judge for reconsideration of the May 13, 1986 Decision and Order. Claimant assigned error to that portion of the order which allowed Lockheed a credit for permanent disability compensation that had already been paid. Lockheed challenged as improper the finding that Claimant was totally disabled as of March 30, 1982 through September 29, 1985. In an order dated June 11, 1986, the Administrative Law Judge rejected the two reconsideration requests and affirmed his original decision. (Appendix D).

Two days later, on June 13, 1986, the Administrative Law Judge *sua sponte* vacated that portion of his original order which allowed the employer to reduce its liability for the payment of permanent total disability compensation by the total amount of benefits previously paid under the schedule. He ordered the employer to pay consecutive awards of permanent

partial disability under the schedule and permanent total disability compensation through September 29, 1985. (Appendix C).

The employer appealed the original decision and the orders on reconsideration of the Administrative Law Judge to the Benefits Review Board on June 19, 1986. In a Decision and Order dated April 28, 1989, the Board vacated the award of permanent total disability compensation made by the Administrative Law Judge and held that Claimant was entitled only to receive benefits for permanent partial disability under the schedule following the date of maximum medical improvement. (Appendix B).

Claimant filed a Petition for Review of the Board decision to the United States Court of Appeals for the Ninth Circuit on May 23, 1989. The Court of Appeals issued an Opinion on June 22, 1990 in which it reversed the Benefits Review Board and reinstated the Administrative Law Judge's finding that Claimant's disability became partial in character at the time when suitable alternative employment was demonstrated to be available to the Claimant. The Court of Appeals agreed with the Administrative Law Judge that Claimant was permanently totally disabled between the date of maximum medical improvement and the date that employability was demonstrated and remanded the case for "further proceedings consistent with this opinion." (Appendix A).

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioner Lockheed Shipbuilding Company opposed the claim that Claimant was entitled to permanent total disability compensation before the Administrative Law Judge, the Benefits Review Board and the Court of Appeals, and all three bodies specifically ruled upon issues raised in this petition.

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) to pass upon the Court of Appeals' interpretation of 33 U.S.C. §908.

ARGUMENT

The Court of Appeals has improperly created a new form of recovery under the Longshore Act for employees who suffer specific injuries listed under the schedule contained in Section 8(c)(1-20). These employees may now recover permanent total disability compensation between the time of maximum medical improvement from their injury through the time that employability is established by the employer. For the first time, claimants will obtain permanent total disability compensation *and* scheduled permanent partial disability compensation.

The opinion below should be reversed because it directly contradicts the mandatory statutory language and Congress' intent. If left unchanged, it will result in a tide of new cases as employees litigate over the date that employability is established following maximum medical improvement from a scheduled injury.

A. Impact of the Decision Below.

The Longshore Act has extraordinarily wide coverage. In 1972, Congress estimated that 800,000 employees were covered by the Act and its extensions. *Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, Committee Print*, 92nd Congress, Second Session. (1972), forward page. During consideration of the 1984 amendments to the Longshore Act, the Senate noted that just five years following the passage of the 1972 amendments, the report of injuries had increased 185%, and the number of claims had increased from 72,000 to 205,000. Similarly, the cost of the benefits had increased 551% and covered employers had been forced to self-insure because coverage under the Longshore Act was

"simply unaffordable." *Senate Report on Conference Report on S.38 Longshoreman and Harbor Workers' Compensation Act Amendments of 1984* (September 20, 1984), final page.

The establishment of a new form of recovery by the Court of Appeals, in the present case, will force insurers to set ever higher rates and premiums at the same time increasing their reserves. Insurers and self-insurers will be unable to accurately estimate the reserves because the Court of Appeals has removed the element of certain recoveries which long existed within the schedule contained in Section 8.

It is likely that the Court of Appeals decision may be applied retroactively. If so, insurers will be forced to pay benefits for which no premiums had been collected. Losses will be paid out of reserves, old claims will be reopened, and the longshore insurance system will be further threatened.

More claims will end up in court. Where the statutory scheme provides for certain recovery for specified injuries under the schedule contained in Section 8(c), the Court of Appeals opinion makes evidence of the loss of wage earning capacity, for the first time, relevant whenever a claimant sustains a scheduled injury. Before the present decision an employer would pay the scheduled award following the date of maximum medical improvement and that would end the case unless the claimant attempted to prove he was permanent and totally disabled. Very few scheduled injuries are of such severity that they even prompt the allegation of permanent total disability. Therefore, the employer has seldom had to resort to showing employability through a labor market survey or some other means following the scheduled injury. The Court of Appeals has added the issue of employability to cases where it did not previously exist. The already overburdened administrative courts will be forced to hear contests over the sufficiency of attempts at showing employability because of the Court of Appeals decision.

The decision of the Court of Appeals will have a wide range impact unless reversed.

B. The Decision Below is Erroneous.

The decision below is demonstrably wrong for several reasons.

1. *The Decision Below Violates the Plain Language of the Statute.*

The present case involves an arm impairment. Disability compensation for an arm is payable under Section 8(c)(1) which provides:

> Section 8 compensation for disability *shall* be paid to the employee as follows: . . . (c) permanent partial disability: in case of disability partial in character but permanent in quality compensation shall be 66-2/3 percentum of the average weekly wages *which shall be in addition* to compensation for temporary total or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and *shall* be paid to the employee as follows:
>
> (1) Arm lost, 312 weeks' compensation.

Section 8(c)(1). (Emphasis added)(Appendix F).

The statute directs that *only* temporary disability compensation "shall be in addition" to permanent scheduled disability benefits. Despite this, the Court of Appeals allowed recovery of permanent total disability compensation in addition to permanent scheduled disability benefits. The Court of Appeals, in effect, added words to the statute.

This Court has refused to revise the clear meaning of the Longshore Act under the guise of statutory construction because only Congress may change the meaning of the Longshore Act. *Pillsbury v. United Engineering Company*, 342 U.S. 197, 199-201 (1952); *Ingalls Shipbuilding, Inc. v. Director, OWCP*,

898 F.2d 1088, 1094 (5th Cir. 1990) (Inequitable result may not be avoided by court changing the Longshore Act. Plain language of the statute controls); *See Rubin v. United States of America*, 449 U.S. 424, 430 (1981) (When the terms of the statute are unambiguous, judicial inquiry ends).

The parties agree that the Claimant in this case had a 20% permanent partial impairment of his arm. This is one of the twenty different specific injuries listed under the schedule contained in Section 8(c). Since Claimant's permanent loss is partial in character, he is limited to the recovery under the schedule in addition to temporary benefits incurred before maximum medical improvement. The statutory language contains the mandatory "shall" which this court has read to prevent Claimant from electing to recover other types of permanent disability compensation. *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 272, 274 (1980)("PEPCO"). In *PEPCO*, the Court concluded that the "character of the disability determines the method of compensation." *PEPCO*, *supra*, at 273. The Court commented that wage earning capacity is considered "irrelevant in cases of permanent partial disability falling within the scheduled provisions." *PEPCO*, *supra*, at 277.

The only alternative to the permanent partial disability award under the schedule is a permanent and total disability award. Section 8(a) provides:

> In case of total disability adjudged to be permanent 66-2/3% of the average weekly wage shall be paid to the employee during the continuance of such total disability. Loss of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases, permanent total disability shall be determined in accordance with the facts.

The recovery of permanent total disability compensation is an alternative to recovery of permanent partial disability com-

pensation under the schedule. *American Mutual Insurance Company v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). As noted by this Court in *PEPCO*:

> Indeed, since Section 8(c) schedule applies only in cases of permanent partial disability. *Once it is determined that an employee is totally disabled, the schedule becomes irrelevant.*

PEPCO, supra, at 277, n.17. (Emphasis added).

Therefore, the plain language in the statute and the interpretation of the statute by this Court establish that permanent total disability compensation and scheduled permanent partial disability compensation are mutually exclusive forms of recovery. The Court of Appeals has impermissibly created a new form of recovery by allowing a claimant to receive permanent total disability compensation between the date of maximum medical improvement and the establishment of alternative wage earning capacity.

2. *The Decision Below Completely Disregards the Policies Enacted By This Court.*

In *PEPCO*, the Court noted that Congress passed the Longshore Act to satisfy two complementary purposes. On the one hand, the Longshore Act is designed to ensure that claimants are compensated for work related injuries. On the other hand, the Longshore Act is designed to limit the liability of employers for monetary damages. Thus the Longshore Act embodies a compromise between employers and employees:

> While providing employees with the benefit of a more certain recovery for work related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits on potential liability than would have been applicable in common law tort actions for damages . . . It therefore is not

> correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disability. Rather, like most workman's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers.

PEPCO, *supra*, at 280-281.

This compromise finds its clearest expression in the schedule contained under Section 8(c). Under this schedule, the determination of the extent of a claimant's disability is purely a medical determination based upon percentage of loss of use of a specific body part. *Dedeaux v. Noble Drilling Corporation*, 9 BRBS 1065, 1066-67 (1978). Payment under the schedule is made regardless of whether an actual loss of wage earning capacity has occurred. *PEPCO*, *supra*, at 283. In other words, a claimant will be paid under the schedule, even if he returns to work following the injury and has suffered no loss of wage earning capacity. A. Larson, *The Law of Workmens Compensation*, §57.13 at 10-41 (1989).

Consistent with the policy of preserving Congress' careful compromise between the interests of laborers and their employers, this Court has found that the Longshore Act may not be expanded beyond its plain language. *PEPCO*, *supra*, at 283. The Court has since refused to expand the meaning of "wages" for determining average weekly wage under the Longshore Act because it would "significantly alter" the balance achieved by Congress between the limitation of recovery by claimants and payment of prompt and certain compensation payments by employers. *Morrison-Knudsen Construction Company v. Director, OWCP*, 461 U.S. 624 (1983). Consistent with these holdings, the Court of Appeals itself recently recognized that the Longshore Act may not be expanded beyond its own language. *Director, OWCP v. Palmer Coking Company*, 867 F.2d 552 (9th Cir. 1989). The Court of Appeals concluded that even if Congress made an error in drafting the statute (in that case Section 22), it is for Congress to correct

the statute rather than for the courts to expand the meaning the statute. *Id.* at 556.

The Court of Appeals failed to follow its own directive in the present case. It has expanded the meaning of the Longshore Act to include recovery of permanent total disability compensation in addition to scheduled permanent disability compensation. This expansion of liability has irrevocably altered the balance established by Congress between the interests of employers and employees. As discussed below, the administration costs and compensation liability of employers will be much higher due to the Court of Appeals' attempt at legislation.

3. *The Decision Below Conflicts With the Consistent Administrative Interpretation.*

By establishing a new form of liability in disregard for the plain language of the Act and the policies of this Court, the Court of Appeals has thrown out years of administrative interpretation of the Longshore Act.

Consistent with this Court's conclusion in *PEPCO*, *supra*, the administrative tribunals have found evidence of loss of future wage earning capacity to be irrelevant if the claimant sustains a scheduled injury. *Conteh v. Greyhound Lines*, Inc., 8 BRBS 874, 875-76 (1978); *Dedeaux v. Noble Drilling Corporation*, 9 BRBS 1065, 1066 (1979).

The date from which a scheduled award begins to run is the date of maximum medical improvement. *Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 235 (1985); *Davenport v. Apex Decorating Company*, 18 BRBS 194, 196 (1986).

Maximum medical improvement is the date on which the claimant's physical condition reaches the point that it "has continued for a lengthy period of time, and it appears to be of lasting and indefinite duration, as distinguished from one in which recovery merely awaits the normal recovery period." *Watson v. Gulf Stevedore Corporation*, 400 F.2d 649, 654 (5th Cir. 1968); *Leech v. Service Engineering Company*, 15 BRBS 18 (1982).

The date of maximum medical improvement is determined solely by medical evidence. *Luce v. Bath Iron Works Corporation*, 12 BRBS 162 (1979). Disability under the Longshore Act is an economic concept based upon a medical foundation. *Owens v. Taylor*, 396 F.2d 783 (4th Cir. 1968). On the date of maximum medical improvement, the claimant's disability changes from temporary to permanent in character. *McCray v. Ceco Steel Company*, 5 BRBS 537, 540 (1977).

In a case where claimant makes a claim for permanent total disability compensation based upon a scheduled injury, the claimant is entitled to recover on the schedule from the date of maximum medical improvement, if it is established that he is capable of performing alternative employment. The date that employability is established following maximum medical improvement is immaterial once it is shown that the claimant is limited to recovery under the schedule. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984).

This Court will defer to administrative determinations when the agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception in its statutory objectives. *United States v. Rutherford*, 442 U.S. 544, 553-554 (1979); *See United States v. Clark*, 454 U.S. 555, 565 (1982).

Administrative courts have treated scheduled injuries consistent with the statutory language and this Court's policy that Section 8(c) schedule permanent partial disability compensation is an *alternative* remedy to permanent and total disability compensation. *PEPCO*, *supra*, at 277, n.17. The Court of Appeals apparently believes that the administrative courts mistakenly relied on the statutory language and this Court's policies. The Court of Appeals should not be allowed to stand alone among all administrative and federal courts in establishing a novel and impermissible interpretation of the Longshore Act.

4. The Decision Below is Incapable of Administration.

Prior to the opinion under review, the administration of scheduled injury cases was simple and certain. If an individual suffered one of the twenty different specific injuries listed in Section 8(c), then that individual received disability compensation on the basis of the percentage of disability, rated under the AMA guidelines, multiplied times the number of weeks of disability compensation afforded the specific injury under the schedule. These payments commenced as of the date of maximum medical improvement.

In the rare case, a claimant's scheduled injury is so severe as to cause him or her to be permanently and totally disabled. The claimant has the burden of establishing an incapacity to return to his former employment. The burden then shifts to the employer to establish claimant's ability to perform alternative employment. If the employer is successful, then claimant is limited to payments under the schedule from the date of maximum medical improvement regardless of when employability is established.

The Court of Appeals has significantly altered this process. A claimant can come back and allege that he is permanently and totally disabled months following the date of maximum medical improvement and following his receipt of permanent partial disability compensation under the schedule. The burden is then on the employer to establish claimant's employability, not as of the time that the labor market survey is performed, but rather as of the date of maximum medical improvement which may be many months before the time that the job survey is done. As noted by the Court of Appeals the employer will need to "overcome the inherent limitations of credible and trustworthy evidence in establishing whether appropriate employment positions were available as of the date of maximum medical improvement." *Stevens v. Director, OWCP*, _____ F.2d _____, 6324 (9th Cir. 1990).

Employers,as a result of the opinion below, carry the heavy burden of establishing wage earning capacity retrospectively. The only alternative is to perform a labor market survey once maximum medical improvement is attained for each and every scheduled injury case. The cost of a job survey would likely exceed the total compensation award for many cases under the schedule.

Employers are placed in the position of rebutting a potential allegation of permanent total disability. This conflicts with the established rule that a claimant has the burden of proving the nature and extent of a disability. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1985); *See Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981) (Claimant does not benefit from statutory presumptions in carrying this burden).

The date of maximum medical improvement does not become known the moment it happens. Instead, it is very often established months or even years following its actual occurrence when medical experts look back upon the course of a claimant's treatment and determine that a point in time existed at which claimant reached maximum cure. Therefore, the labor market survey required by the Court of Appeals' opinion to disprove a potential allegation of permanent total disability will, most often, be performed well after the point of maximum medical improvement. It will be an unfair burden on employers to establish employability as of a remote date of maximum medical improvement. Employers and insurers will be unable to accurately set required reserves, and insurance costs undoubtedly will rise.

CONCLUSION

The Court of Appeals has established a new form of recovery under the Longshore Act resulting in the abrogation of the certain and prompt method of compensation established by Congress. Lockheed Shipbuilding Company respectfully urges the Court to review the opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILBORN STEVENS,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; LOCKHEED SHIPBUILDING CO.,
Respondents.

No. 89-70224
BRB No. 86-1656
OPINION

Petition to Review a Decision of the Benefits Review Board

Argued and Submitted
May 10, 1990—Seattle, Washington

Filed June 22, 1990

Before: Jerome Farris, Harry Pregerson and Warren J. Ferguson, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Workers' Compensation

Reversing and remanding a decision of the Benefits Review Board, the court of appeals held that an injured worker's total disability becomes partial only when there is a suitable alternative available job that the worker can perform.

After petitioner Wilborn Stevens injured his arm in a work related accident on May 8, 1981, he received appropriate medical treatment and reached maximum medical improvement on November 29, 1982. The administrative law judge held that Stevens suffered a 20 percent loss of use in his right arm. At a December 16, 1985 hearing on Stevens' claim for compensation, a vocational specialist established that Stevens had a residual earning capacity and could perform and get a job in a convenience food store or a self-service gas station as of September 30, 1985. These jobs were not shown to be available to Stevens at any earlier date. The administrative law judge awarded Stevens temporary total disability compensation from 1981 to November 29, 1982, permanent total disability from that date until September 30, 1985, the date after which employment was found to be available, and permanent partial disability from September 30, 1985 until benefits ended by schedule. The Benefits Review Board vacated and reversed the ALJ's award of permanent total disability, finding that Stevens was only entitled to permanent partial disability for that time period, retroactively applying the showing of a suitable alternative available job to the date of maximum medical improvement.

[1] The Board erred in holding, as a matter of law, that total disability becomes partial, retroactive to the time of maximum medical improvement upon a later showing of suitable alternative available employment. [2] The central question before the court was when does a total disability become partial. [3] The statutory definition of disability supports using the date of available suitable alternative employment as the indicator. A claimant is only able to work if there is suitable work available that he is capable of performing. [4] To hold that a disability changes from total to partial at the same time it changes from temporary to permanent, advances the medical aspect of the disability while ignoring its economic aspect, the degree of the disability. It assumes as well that the job market was the same at the time of the maximum medical improvement as when the job showing was made. Since

courts have no crystal ball, the pivotal fact must be proof of an actual job that the claimant can perform and realistically get if diligently sought.

COUNSEL

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Russell Mertz, Witherspoon, Kelley, Davenport & Toole, Seattle, Washington, for the respondent, Lockheed.

Stephen C. Embry, Embry and Neusner, Groton, Connecticut, for the amicus, Boilermakers International Local 620.

Diane L. Middleton, San Pedro, California, for the amicus, Maritime Claimants' Association.

OPINION

FARRIS, Circuit Judge:

This case raises a question of interpretation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq.: When does an employee's disability that was total become partial for purposes of compensation under 33 U.S.C. § 908? The Benefits Review Board held that when an employer makes a showing that there was suitable alternative employment reasonably available to a disabled employee, total disability becomes partial and the change of status is retroactive to the date of maximum medical

improvement. We reverse, rejecting *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). We agree that disability becomes partial when suitable alternative employment is or was realistically available to the employee, which must be demonstrated by the employer, but we reject the retroactive aspect of the Board's holding. Until there is a job that the injured worker can perform, his injury is totally disabling.

STANDARD OF REVIEW

We scrutinize Board decisions for errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations. "[T]he Board may not substitute its views for those of the administrative law judge or engage in a *de novo* review of the evidence, and it must accept the administrative law judge's factfindings if they are supported by substantial evidence." *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327 (9th Cir. 1980). We conduct an independent review of the administrative record. *Id.*

The Benefits Review Board does not make policy; its interpretations of the Longshore and Harbor Workers Compensation Act are not entitled to any special deference. *Providence Washington Insurance Co. v. Director, Office of Workers' Compensation Programs*, 765 F.2d 1381, 1384 (9th Cir. 1985). We will only respect the Board's interpretation if it is "reasonable and reflects the policy underlying the statute." *Kaiser Steel Corp. v. Director, Office of Workers' Compensation Programs*, 812 F.2d 518, 521 (9th Cir. 1987) (citations omitted).

FACTS

Wilborn K. Stevens injured his right arm in a work related accident on May 8, 1981. He received appropriate medical

treatment, including two surgeries, and reached maximum medical improvement on November 29, 1982. Maximum medical improvement is attained when the injury has healed to the full extent possible. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The ALJ held that Stevens suffered a 20% loss of use in his right arm.

Lockheed voluntarily paid *temporary total disability* compensation to the claimant from May 8, 1981 (date of injury), until February 6, 1983, at which time it began to pay *permanent partial disability* compensation for a 20% loss of use of a right arm.

At a December 16, 1985 hearing on Stevens' claim for compensation before an administrative law judge, a vocational specialist established that Stevens had a residual earning capacity. Stevens could physically perform and get a job in a convenience food store or a self-service gas station as of September 30, 1985. Lockheed does not contend that these jobs were shown to be available to Stevens at any earlier date.

The ALJ awarded Stevens a) *temporary total disability* compensation from May 9, 1981 to November 29, 1982, b) *permanent total disability* compensation from November 30, 1982 until September 29, 1985 (the date after which employment was found to be available), and c) *permanent partial disability* from September 30, 1985 until benefits ended by schedule (62.4 weeks).[1]

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[1]Permanent total disability pays 66 2/3% of the employee's average weekly wage for the duration of the disability. 33 U.S.C. § 908(a). Temporary total disability pays 66 2/3% of the employee's average weekly wages during the duration of the disability. 33 U.S.C. § 908(b). Permanent partial disability pays 66 2/3% of the employee's average weekly wage for a length of time determined by schedule. 33 U.S.C. § 908(c). Temporary partial disability pays 66 2/3% of the difference between the injured employee's avergage weekly wages before the injury and his wage earning capacity after the

Lockheed appealed to the Benefits Review Board, which vacated and reversed the ALJ's award of *permanent total disability* between November 30, 1982 and September 29, 1985, finding that Stevens was only entitled to *permanent partial disability* benefits for that time period. The Board retroactively applied the showing of a suitable alternative available job to the date of maximum medical improvement.

DISCUSSION

[1] ***The Board erred in holding, as a matter of law, that total disability becomes partial, retroactive to the time of maximum medical improvement upon a later showing of suitable alternative available employment.***

Once an employee is injured, he has the burden of showing that the injury was work-related and that the injury prevents him from performing his former job. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). When the employee makes this showing, the burden shifts to the employer to prove that there is "suitable alternate work . . . available in the community." *Id.* 1196. If the employer fails to meet this burden, the disability is considered total and, most likely, permanent. *See id.*

To satisfy its burden of showing suitable alternative available employment "the employer must point to *specific* jobs that the claimant can perform." *Bumble Bee Seafoods*, 629 F.2d at 1330 (emphasis in original). A showing that a claimant might be physically able to perform general work is insuf-

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injury in the same or another job, for not more than five years. 33 U.S.C. § 908(e).

For Stevens, the schedule under permanent partial disability provides for 312 weeks of compensation for the loss of an arm. Since Stevens' disability was only 20%, this works out to be 62.4 weeks of compensation (.20 x 312), regardless of whether there is an actual income loss.

ficient. *Hairston*, 849 F.2d at 1196. In determining the employee's ability to perform possible work, the Board must consider the claimant's technical and verbal skills, as well as the likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the possible job. *Hairston*, 849 F.2d at 1196. *See also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981).

We place this burden on the employer, "[o]therwise, the claimant would have the difficult burden of proving a negative, requiring him to canvass the entire job market." *Bumble Bee Seafoods*, 629 F.2d at 1329.

Lockheed does not contest that Stevens properly received *temporary total disability* payments up until the time he attained maximum medical improvement. At that time his temporary disability became permanent; it was temporary so long as there was a possibility or likelihood of improvement. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

[2] The central question, however, is left unanswered by the existing case law: When does a *total* disability become *partial*? Our analysis must focus on the statute and the policy concerns embodied in the Act.

The Longshore and Harbor Workers' Compensation Act provides coverage for four different categories of disabilities: permanent total disability (§ 908(a)); temporary total disability (§ 908(b)); permanent partial disability (§ 908(c)); and temporary partial disability (§ 908(e)). This statutory structure indicates two independent areas of analysis — *nature* (or duration) of disability and *degree* of disability. Temporary and permanent go to the nature of the disability. Total and partial go to the degree of the disability. This differentiation leads us to find maximum medical improvement to be an indication of permanent versus temporary disability and

availability of suitable alternative employment to be an indication of partial versus total disability. *See also Bumble Bee*, 629 F.2d at 1328 ("The degree of physical impairment is measured by its impact on the worker's earning capacity.").

[3] The statutory definition of "disability" supports using the date of available suitable alternative employment as the indicator for when total disability becomes partial.

> "Disability" means *incapacity* because of injury *to earn* the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

33 U.S.C. 902(10)(emphasis added).[2] This definition encompasses an economic, wage-earning aspect. *See also McBride v. Eastman Kodak Co.*, 844 F.2d 797, 799 (D.C. Cir. 1988) (An "exclusively physical view of disability defeats the purpose of the LHWCA. The statute's equation of disability with 'wage-earning capacity' reflects a concern for the economic consequence of job-related injuries . . . ."). The incapacity *to earn* is a result not of the permanent or temporary character of the disability, but the total or partial character of the disability. *See Bumble Bee*, 629 F.2d at 1328 ("The degree of physical impairment is measured by its impact on the worker's earning capacity."). A claimant is only able to work when there is suitable work available that he is then capable of performing. *See Hairston*, 849 F.2d at 1196; *American Mutual Insurance Co. v. Jones*, 426 F.2d 1263, 1266 (D.C. Cir. 1970). *See also*

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[2]There was no argument made that section 910(d)(2), addressing occupational injury that appears once a worker is retired, applies in this case.

Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 644 F.2d 827 (9th Cir. 1981) (unavailability of work a claimant is able to perform is one of the considerations in determining disability).

Notwithstanding the Board's position in this case, some of its other decisions support the interpretation that we now adopt. *Williams v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979), and *Thompsom v. McDonnell Douglas Corp.*, 17 BRBS 6, 9 (1984), found the date of possible rehiring (a residual earning capacity) not a good indication of the claimant's maximum medical improvement. This suggests the reverse, that the date of maximum medical improvement is not a good indication of the date of possible rehiring.

[4] The Board's position that an employee is no more or less capable of performing a specified task between the time he reached maximum medical improvement and a later showing of available work is not inaccurate. However, to hold that a disability changes from total to partial at the same time it changes from temporary to permanent, advances the medical aspect of the disability while ignoring its economic aspect — the degree of the disability. It assumes, as well, that the job market was the same at the time of maximum medical improvement as when the job showing was made. This is unclear. It could be that a new job within the disabled claimant's abilities appeared only sometime after maximum medical improvement was attained or that only with training and education *after* attaining maximum medical improvement will there be a job suitable for the claimant. *Cf. Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986) (only suitable alternative shown to exist was a job not even created until some time after maximum medical improvement). Since courts have no crystal ball, the pivotal fact must be proof of an actual job that the claimant can perform and realistically get if diligently sought.

This does not prevent an employer from satisfying the ALJ that there was suitable alternative available work at the time

of maximum medical improvement, even several years after that point. The employer merely needs to overcome the inherent limitations of credible and trustworthy evidence. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542-43 (4th Cir. 1988) (employer could meet burden of showing available alternate employment by presenting evidence of jobs which, although no longer open when located and identified, were available during time claimant was able to work); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988) (finding suitable available jobs existed in 1979, based on 1983 labor market survey and fact that rehabilitation specialist had met with employee in 1978-79 and offered to place employee in a job). Such a finding would still be subject to our review under the substantial evidence standard.

Finally, the interpretation we adopt reflects the Act's interest in facilitating the rehabilitation of injured employees and their re-entry into the work force by creating an incentive for employers to show promptly the availability of jobs. That incentive, although not manifest in the statute, has the effect of bringing to the claimant's attention possible jobs he might otherwise not know of, recognizing that the employer has no obligation to find the claimant a job.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPENDIX B

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, DC 20036

WILBORN K. STEVENS,
Claimant-Petitioner

v.

LOCKHEED SHIPBUILDING COMPANY,
Self-Insured Employer-Petitioner

Filed as Part of the Record Apr. 28, 1989

BRB No. 86-1656

DECISION AND ORDER

Appeal of the Decision and Order, the Order on Reconsideration, and the *sua sponte* Order on Reconsideration of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Gibbs, Douglas, Theiler & Drachler), Seattle, Washington, for claimant.

Charles E. Henshall (Witherspoon, Kelley, Davenport & Toole), Seattle, Washington, for self-insured employer.

Before: SMITH, Acting Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order, the Order on Reconsideration and the *sua sponte* Order on Reconsideration (84-LHCA-2730) of Administrative Law Judge Steven E. Halpern awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation

Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921 (b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed by Lockheed Shipbuilding Company as a shipscaler. On May 8, 1981, he slipped descending a ladder and twisted his right arm at the elbow. Claimant was treated for "traumatic lateral epicondylitis right elbow as a result of strain." Employer's Exhibit 6. 1. Released to return to work on May 26, 1981, he reported but was unable to carry out his duties. Claimant consulted an orthopedic surgeon in July 1981 who performed a lateral release and synovectomy of the right elbow. Claimant once again attempted to return to work in April 1982 but continued to experience pain and discomfort and worked only briefly. Claimant was referred to Dr. Almquist, a Board-certified orthopedic surgeon specializing in injuries of the arm and hand, who performed a posterior interosseous nerve release in the upper forearm area. On November 29, 1982, Dr. Almquist concluded that nothing more could be done for claimant and stated that he doubted if claimant's right arm would ever be strong enough to allow him to climb or do strenuous exercise. In February 1983, Dr. Almquist determined that claimant had a 20 percent functional impairment of the arm. Dr. Almquist restricted claimant from climbing high ladders, lifting more than 10-20 pounds, and performing pushing, pulling, and twisting motions. Two years later, in February 1985, Dr. Almquist determined that claimant was experiencing severe arthritic changes of his cervical spine and referred claimant to a neurologist who concluded that claimant's arthritic condition was unrelated to his arm injury. Dr. Almquist agreed with this assessment and in April 1985 reported that claimant's "arthritic condition in his neck is not related to his industrial injury but the limitations of his work

restrictions are related, to the best degree I can evaluate, to his arthritic condition in his elbow." Claimant's Exhibit 4.35. In March 1985 claimant was evaluated by employer's experts, Orthopaedic Panel Consultants, who concluded that claimant's disability could not be substantiated by objective testing and further, that claimant's weakness in the hand and arm were functional in nature, and assigned a disability rating of 5 percent. Employer paid claimant temporary total disability through February 5, 1983, the date Dr. Almquist determined that claimant had a 20 percent functional impairment of the arm. On that date, employer commenced permanent partial disability payments based on Dr. Almquist's determination.

The administrative law judge found that claimant sustained an on-the-job injury on May 8, 1981, in the course and scope of covered employment, that claimant reached maximum medical improvement on November 30, 1982, and that claimant was totally disabled from that date until September 30, 1985, when employer demonstrated the availability of suitable alternative employment. The administrative law judge awarded permanent total disability benefits from November 30, 1982, through September 30, 1985. The administrative law judge found that claimant was permanently partially disabled after September 30, 1985, but that the 62.4 weeks of compensation to which he would have been entitled, based on the 20 percent impairment of the arm, was subsumed in the greater award for permanent total disability. In an Order on Reconsideration the administration law judge rejected employer's argument that the date of maximum medical improvement, rather than the date upon which employer presented evidence of suitable alternative employment, determined the date of permanent partial disability. The administrative law judge also rejected claimant's argument that it was error to find that the scheduled award for permanent partial disability was subsumed in the award for permanent total disability. In a *sua sponte* Order on Reconsideration the administration law judge, relying on *Dar-*

den v. Newport News Shipbuilding and Dry Dock Co., 18 BRBS 224 (1986), vacated his previous determinations in the Decision and Order and the Order on Reconsideration. He found that the scheduled award for permanent total disability and ordered employer to pay 62.4 weeks of scheduled disability benefits beginning September 30, 1985.

On appeal, employer argues that the administrative law judge's award of permanent total disability was not supported by the evidence of record and that the administrative law judge erred in awarding permanent total disability benefits after the administrative law judge's finding of permanent total disability is supported by substantial evidence and should be affirmed.

Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. The permanency of any disability is a medical rather than an economic concept. The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.5 (1985); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 60 (1985); *see also Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Trask*, 17 BRBS at 60; *see also Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Employer bases its argument that claimant was not entitled to permanent total disability benefits past the date of maximum medical improvement on the holding in *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). In that case the Board held that "it was reasonable to conclude that claimant became partially rather than totally disabled once he reached maximum medical improvement and no longer received treatment, regardless of the date employer first presented evidence of available alternative employment."

16 BRBS at 234. The rationale for the approach taken in *Berkstresser* is that a claimant becomes entitled to an award for permanent disability once his condition becomes medically stationary. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). Thus, under this approach permanent partial disability commences on the date of maximum medical improvement even if it is based on a later showing of suitable alternative employment. *See Turney*, 17 BRBS at 235 n.5.

We continue to believe that the approach taken in *Berkstresser* is most consistent with the structure and purposes of the Act. In discussing the Board's decision in *Berkstresser*, the administrative law judge questioned the Board's statement that in that case it was "reasonable" to conclude that partial disability commenced on the date of maximum medical improvement, regardless of the date the employer first presented evidence available alternative employment. 16 BRBS at 234. The administrative law judge also indicated that the holding in *Berkstresser* effected a "dramatic departure from prior case law." Decision and Order on Reconsideration at 2. He did not, however, provide any case citations in support of this conclusion, and we are not aware of any precedent contrary to *Berkstresser*. Claimant relies on *Hunter v. Duncanson-Harrelson Co.*, 14 BRBS 424 (1981), in support of his contention that the date of showing suitable alternate employment is the date of onset of permanent partial disability. In *Hunter*, the Board affirmed an administrative law judge's conclusion that suitable alternate employment was shown to be available as of the date claimant's condition became permanent and that permanent partial disability benefits thus commenced as of that date. The result in *Berkstresser* is therefore not inconsistent with that in *Hunter*.[1]

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[1] The holding in *Durden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986), is distinguishable from that in *Berkstresser* and the instant case. The *only* showing of suitable alternative employment

The holding that the award of permanent partial disability commences on the date of permanency once employer establishes suitable alternate employment is consistent with the principles for establishing nature and extent of disability. Once permanency is established, claimant's condition is medically stationary, and it is the extent of his disability in that medical condition which is evaluated. Where claimant establishes an inability to perform his usual work, he has made a *prima facie* showing of total disability which can be defeated by employer's establishing the availability of suitable alternate employment. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F. 2d 1327, 12 BRBS 600 (9th Cir. 1980). Employer need not actually obtain a job for claimant, but must produce evidence of specific and realistic job opportunities which claimant could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). A determination of claimant's ability to perform available alternate employmentis based on his permanent medical restrictions. Thus, the nature and extent of disability are interrelated.

The focus of past cases involving suitable alternate employment has been on *whether* suitable jobs are shown to be available after the date of permanency and thus whether employer has met its burden. Although the *date* jobs are available has been addressed in this context, *see Trans-State Dredging v.*

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in *Darden* was a job created by employer. The Board held that in those circumstances, the administrative law judge reasonably determined that claimant was permanently totally disabled from the date of maximum medical improvement until the creation of the position by employer. 18 BRBS at 228. The Board affirmed the administrative law judge's scheduled award of permanent partial disability benefits thereafter. In the instant case, employer's showing of the availability of suitable alternative employment involved positions outside employer's facility.

Benefits Review Board, 731 F. 2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F. 2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988), the administrative law judge's holding in this date for a new purpose — establishing the date of onset of permanent partial disability. This result would dramatically alter employer's burden in establishing suitable alternate employment by requiring employer to establish the availability of a specific suitable alternate job on the date claimant's condition became permanent or be held liable for a period of permanent total disability. *Cf. Trans-State Dredging, supra* (reversing a Board decision holding that jobs must be available during "critical periods"); *Tann, supra* (reversing a Board decision that jobs must be available at the time an employment survey is taken and holding that they need only be available during the time claimant was medically able to work). The Board declined to adopt this approach in *Berkstresser* and *Turney*, and we will not do so now.

We believe that, consistent with *Berkstresser*, the extent of a claimant's disability cannot be considered separate from its permanency; the nature and extent of disability are not two mutually exclusive terms. It is claimant's ability to work during the entire period after permanency that is relevant to suitable alternate employment is shown to be available after claimant's medical condition is permanent, the date of permanency is the date of onset of permanent partial disability. We therefore vacate the administrative law judge's award of permanent total disability benefits and modify his decision to reflect that claimant is entitled to a permanent disability award from November 30, 1985, based on a 20 percent impairment of the arm.[2]

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[2] In light of our modification of the administrative law judge's award of permanent total disability to a scheduled award of permanent partial disability, we need not reach employer's other arguments on appeal that the administrative law judge erred in his crediting of testimony to find claimant

Accordingling, the administrative law judge's award of permanent total disability benefits is vacated, and the award is modified to provide permanent partial disability benefits in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

/s/ Roy P. Smith, Acting Chief
ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

Dated this 28th day of April 1989

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permanently totally disabled. Employer does not contest claimant's permanent partial disability or the administrative law judge's reliance on Dr. Almquist's opinion that claimant sustained a 20 percent impairment to his arm as a result of his injury.

APPENDIX C

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
211 Main Street
San Francisco, California 94105

WILBORN K. STEVENS,
Claimant,

v.

LOCKHEED SHIPBUILDING COMPANY
Self-Insured Employer.

CASE NO: 84-LHC-2730

OWCP NO: 14-61861

ORDER ON RECONSIDERATION — SUA SPONTE

Subsequent to the issuance of the June 11, 1986 Order on Reconsideration of the Decision and Order issued May 13, 1986, there has come to my attention that the Benefits Review Board, in *Darden v. Newport News Shipbuilding and Dry Dock Company*, BRB Nos. 81-2535 and 81-2535 A (May 2, 1986)[1], held that an award for permanent partial disability under the schedule is not subsumed in a prior award for permanent total disability.

Accordingly, I now vacate that portion of the aforesaid Decision and Order and that portion of the aforesaid Order on Reconsideration in which I held to the contrary.

The effect of the following Order is that respondent is not entitled to credit the already paid schedule award against its obligation under the permanent total award.

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[1] Since Darden has not yet been published in the BRBS service, the advance copy is appended hereto for the convenience of the parties.

ORDER

In addition to the compensation awarded by the Decision and Order of May 13, 1986, respondent shall pay to claimant 62.4 weeks of compensation for his schedule disability, beginning September 30, 1985.

STEVEN E. HALPERN
Administrative Law Judge

Dated: June 13, 1986
San Francisco, California

APPENDIX D

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
211 Main Street
San Francisco, California 94105

WILBORN K. STEVENS,
Claimant,

v.

LOCKHEED SHIPBUILDING COMPANY
Self-Insured Employer.

CASE NO: 84-LHC-2730

OWCP NO: 14-61861

ORDER ON RECONSIDERATION

Counsel for claimant has filed a Motion for Reconsideration of the Decision and Order issued May 13, 1986, and specifically "for reconsideration of that portion of the Order which held that the scheduled award for permanent partial disability was subsumed in the greater award for permanent total disability."

Said motion complains that no authority was cited in said Decision for said holding; however, claimant's counsel concedes that her "research has thus far not yielded any cases which are directly on point."

I was at the time the Decision was written surprised that the issue appeared to be a matter first impression, although that now seems to be confirmed by claimant's counsel.

I have considered the arguments made on claimant's behalf but remain persuaded that claimant, who has been awarded compensation for permanent total disability in excess of that

to which he is otherwise entitled under the schedule for his permanent partial disability, is entitled to no additional compensation under the schedule when his compensation for permanent total disability ceases.

Accordingly, I shall not disturb my prior holding.

Respondent has filed a Motion for Reconsideration in which it urges that claimant should be found partially rather than totall disabiled during that period (after he had reached maximum medical improvement) in which he was unable to perform his prior Longshore work and before suitable alternative work had been demonstrated to be available.

Additionally, respondent contends "that at the very latest, suitable alternative employment was effectively demonstrated as of February 27, 1985" rather than as of September 30, 1985 as I found in said Decision.

So far as respondent's first stated contention is concerned, the well established state of the law is that a claimant who has been shown to be unable to perform his former Longshore work is totally disabled as a matter of law until such time as the employer shows the existence of suitable available alternative employment. On that basis I found claimant totally disabled until such time as such showing had been made. As authority to the contrary respondent cites *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS, 231 (1984).

Preliminarily, it must be noted that the nature of a claimant's disability has reference to whether it is temporary or permanent; it is temporary until the point of maximum medical improvement is reached and it is permanent thereafter. And, the extent of disability has reference to whether it is partial or total; this concept has nothing to do with the date of maximum medical improvement, but rather concerns itself with the question of whether claimant is partially able to work or is entirely unable to work.

In Berkstresser the Board rejected claimant's argument that "the earliest date when suitable alternative employment is shown to be available is the date his disability ceased to be total and become partial." By way of explanation of its rejection of claimant's contention the Board stated "although it is often repeated that the extent of disability underr the Act is both a medical and economic concept, the Administrative Law Judge was not bound to decide when the extent of disability became fixed solely on the basis of job availability. *It was reasonable to conclude that claimant became partially rather than totally disabled once he reached maximum emdical improvement and no longer received treatment, regardless of the date the employer first presented evidence of available alternative employment.*" (emphasis added)

Why the Board found it "reasonable" to so conclude is not explained. I can hardly believe that the Board intended to effect a dramatic departure from prior case alw, and to establish precedent in this summary manner, without a detailed rationale. Accordingly, I consider the holding in Berkstresser to be of doubtful precential value. In any event, however, Berkstresser at most provides an alternative to prior case law, since the Board's holding goes no further than to indicate that it was "reasonable" to reach its conclusion, and not that such conclusion was compelled.

In consideration of respondent's motion I decline to employ the Berkstresser alternative and adhere to my prior conclusion that claimant was permanently and totally disabled from the time of maximum medical improvement until the existence of suitable alternative employment was shown.

Respondent's second contention is not without merit. That is to say, it does appear that through claimant's fault, respondent's vocational assessment of him, which ultimately lead to the showing of suitable available alternative employment, was delayed. However, respondent has not demonstrated that the suitable alternative employment which I found to have been

shown to have been actually available as of September 30, 1985, was in fact available at any time prior thereto. Given that respondent was delayed in the vacational assessment as a result of which its labor market survey was ultimately produced, no reason has been advanced why, once that assessment had been made, a retrospective labor market survey establishing the existence of suitable available alternative employment at an earlier date could not have been made. Without evidence on the question I would have to speculate, which I decline to do.

Accordingly, on consideration of the second item of respondent's motion, I shall not disturb my prior finding.

ORDER

Upon reconsideration the decision and Order of May 13, 1986 remains as issued.

/s/ Steven E. Halpern
STEVEN E. HALPERN
Administrative Law Judge

Dated: June 11, 1986
San Francisco, California

APPENDIX E

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
San Francisco, CA 94105

WILBORN K. STEVENS,
Claimant-Petitioner

v.

LOCKHEED SHIPBUILDING COMPANY,
Self-Insured Employer-Petitioner

Filed as Part of the Record May 13, 1985

CASE NO. 84-LHC-2730
OWCP NO. 14-61861

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Before: STEVEN E. HALPERN
Administrative Law Judge

DECISION AND ORDER — AWARDING BENEFITS

This is a proceeding under the Longshore Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, and the regulations in implementation thereof.

The 65 year old claimant has a 10th grade education. Having served a fourteen year prison sentence for murder he worked for a catering company in Seattle, from 1957 to 1964. He worked for Todd Shipyards from 1964 until 1980, mainly as a ship scaler supervisor.

On May 8, 1981 claimant suffered an injury to his (major) right arm in the course and scope of his covered work as ship scaler for respondent. At that time his average weekly wage was $421.64. (Tr.8)

Compensation for temporary total disability has been paid thru February 6, 1983. If the subject injury is a scheduled one, respondent has no additional compensation liability under the schedule, since compensation for a conceded scheduled 20% loss of use of the arm has been paid, and no greater degree of scheduled disability is asserted.

Principally in dispute is whether or not the subject injury has rendered claimant totaly disabled so as to entitle him to a non scheduled award.

The evidence is in conflict regarding the extent to which, if any, the residual effects, if any, of the subject injury affect claimant's ability to work.

Claimant's surgeon, E. Almquist, M.D., Board-certified in orthopedic surgery and a specialist in the hand and arm, is at least as well qualified in the appropriate area of medicine as any other reporting physician, and he has has the most intimate contact with and the greatest opportunity to assess claimant's ongoing arm problems. I therefore credit his opinion.

Accordingly, I find that although claimant suffers from right upper extremity difficulty as a result of an unrelated cervical condition (of which claimant first made complaint to Dr. Almquist on 2/28/85), the residuals of the subject accident alone are productive of pain and loss of function such as precludes "a lot of strenuous activity with his arm." (C-27, p.55)

Given claimant's uncontroverted and credible description, the ship scalers work in the course of which he was injured falls in that category, and he is found to be unable to perform it.

Following the second of two surgeries claimant was maximally medically improved from the subject injury as of November 29, 1982; it is concluded that the nature of claimant's disability was temporary until that date and permanent thereafter.

Therefore, absent showing of suitable available alternative work, a finding of total disability beginning November 30, 1982 and continuing is compelled, notwithstanding that the injury is to a scheduled member.

Respondent's vocational rehabilitation counselor, Stephen Miller, conducted a three hour interview with claimant on February 27, 1985, administered a two hour test in October 1985 designed to access claimant's basic occupational and literacy skills, and subsequently met with claimant briefly for the purpose of obtaining a handwriting sample.

By way of contrast, claimant's vocational counselor interviewed him for an hour and a half on May 29, 1985 and conducted no testing.

Additionally, respondent's expert had significantly more direct contact with potential employers than did claimant's expert, and at trial demonstrated a more detailed knowledge of the relevant job market. He specifically ascertained from potential employers that an individual such as this claimant is a viable applicant for the jobs ultimately recommended.

Of the jobs specifically recommended, I find suitable, available and gainful, those of "cashier, convenience food store" and "cashier, self-service gas station." (Tr. 108, 115).

As to said jobs respondent's expert candidly testified: "I think it's important when we're discussing these to bear in mind that I'm not saying that these are wonderful jobs. I'm

not saying that these are highly desirable jobs or that they're jobs that I think he should do. What my position is is that they are jobs out there, that they are real jobs, that he possesses the basic qualifications for, and that he could do that. He could actually secure jobs of that type if he so chose." (Tr. 108)

As to claimant's age he testified: " . . . The types of jobs that we're talking about here I think are generally characterized by a fairly low skill level, fairly low educational requirements, and because of the low pay there is frequently quite a bit of turnover seems to be one of the major problems, that they have turnover. And in that kind of a setting I've had quite a number of employers say to me — it depends a little bit on the location of the type of job we're talking about. If it's a really hectic busy one, I suppose he might find some people who would discriminate against someone in that age bracket, but in general I found a lot of folks who say they would actually prefer a retired person or someone that's a slightly older age bracket because they tend to be more dependable, more consistent, more reliable, etc." (Tr. 108-109)

As to physical demands he testified: "Well, my experience has been that number one they just don't require lifting over 20 pounds. Mr. Stevens completed a Physical Capacities evaluation form in which he noted that he felt he could lift up to 20 pounds with his left hand. More specifically, the type of stocking that is done in those kinds of places is almost invariably — I mean I have gone through so many of these jobs precisely because they keep coming up over and over again. The stocking is done on an as-time-becomes-available basis. In other words, between customers you go out and you stock potato chips, eggs, or the one item that does weigh a little bit is canned beverages, you, the pop and soda. And I have never met a manager who said there would be any problem with just doing one six-pack at a time. And then you do that until the next car comes in and as long as you get the case unloaded before the next shift, I've never seen any problem with that." (Tr. 110-111)

As to the claimant's historical felony conviction he testified: "And I also asked specifically if somebody with a felony conviction — if that would specifically determine. And the response I got was maybe yes, maybe no. In other words, it certainly doesn't help to have that kind of a background, and I wouldn't pretend that it does. On the other hand, neither does it necessarily preclude people . . . So per se yeah, certainly it can be a problem, but it's not an insurmountable problem by any means. I think Mr. Stevens' own work history demonstrates that. He came straight out of 14 years of jail and went directly to work for a couple of jobs there including a catering service where he had a lot of responsibilities." (Tr. 113)

His ultimate opinion is reflected by the following:

Q. Given all that, your discussions with these managers, etc., plus your knowledge of Mr. Stevens gleened through your time spent with him and the testing, the medical records, and your understanding of his limitations, is it your opinion that these jobs that you found, as contained in your report, are suitable for him given his age, education, skills, aptitudes and physical limitations?

A. Yes. I think he could be considered and should be a viable candidate for work of that type. It's just that they're so consistent, these managers, when I deal with them. They're over and over again like broken records. What they want is dependability, what they want is reliability, they want people who are going to show up on time. And those are kind of personal characteristics that are within the control of the individual applicant. So the answer is, in my opinion if he really wanted to do these jobs, then he could do them, he could obtain work." (Tr. 114)

As to claimant's attitude he testified: "Well, when I met with him in February, I was going over some of these jobs

and I started off at these jobs which are essentially kind of the lower level jobs. And he agreed he could probably do them. And then I started working my way up and I got up to a point where I said, 'Well, how about being a manager at a mobile home park for retired folk,' which is a fairly easy job, and at that point he made a quote which was quote, I could do a lot of things, but whether I would or not is a different question," unquote. So my impression was yeah, he thinks he could do these jobs, but they're just not attractive to him, they're not appealing." (Tr. 114-115)

As result of five driving while intoxicated convictions, claimant's drivers license has been revoked. The incidents culminating in that revocation all occurred since the subject accident. (Tr. 100-101)

Claimant's vocational rehabilitation counselor Amanda Gambrell, indicates "what the biggest problem is is he doesn't have a driver's license . . . and that precludes him from getting to and from work . . . there's a lot of jobs that he probably could have done if he had a driver's license." (Tr. 69)

However, this respondent is not responsible forthe post subject injury circumstances as a result of which claimant is precluded from driving. Furthermore, while the use of public transportation may be inconvenient, I do not believe that it is a significant barrier to employment, particularly if claimant's testimony that he would like to go back to work is to be believed. (Tr. 60)

It is evident that claimant, although he denies it, has an alcohol problem. However, he has maintained employment for many years notwithstanding that problem, and there appears to be no reason why he could not do so now.

I find that claimant is a viable candidate for the employment concededly (Tr. 143) shown to have been available as of September 30, 1985 (R-26, p.26.7, 26.8, 26.9 at Section I); said jobs constitute suitable alternative employment.

Furthermore, as above indicated, it is the unrebutted testimony of respondent's vocational consultant that claimant agreed that he was capable of performing certain work. Claimant not having retaken the stand to rebut that testimony, I accept it; and, claimant, after all, knows better than anyone what he is capable of doing. While I well understand why, as its vocational consultant testified, claimant might elect not to pursue employment, respondent's burden is satisfied on a showing that such employment is actually available. As of September 30, 1985, *but not before*, respondent has so shown.

Therefore, claimant's disability, which until that time was legally total in extent, then became partial in extent. And, the lesser award of 62.4 weeks of compensation for permanent partial disability, to which claimant otherwise would have been entitled under the schedule (20% of the arm x 213 weeks), is subsumed in the greater award for permanent total disability.

Respondent at trial raised a § 8(f) issue, which it agrees should first be considered by the Deputy Commissioner (Tr. 11). In keeping with the spirit of the 1984 Amendments to the Act and the regulations in implementation thereof, while the Director might not contest my jurisdiction to adjudicate the issue, I shall remand the matter to the Deputy Commissioner for his prior consideration.

ORDER

1. Respondent shall pay to claimant compensation for temporary total disability from May 9, 1981 to November 29, 1982 at the weekly rate of $281.09 (2/3 x $421.64).

2. Respondent shall pay to claimant compensation for permanent total disability at the initial weekly rate of $281.09 from November 30, 1982 to September to September 29, 1985; said amount is subject to periodic increases as provided by the Act.

3. Respondent shall take credit for compensation already paid and all unpaid compensation shall bear interest from the date due until paid at the rate provided by 28 U.S.C. § 1961 (1982).
4. Respondent is and continues liable for medical and associated benefits.
5. All computations necessary for the effectuation of this Order shall be made or verified by the Deputy Commissioner.
6. The matter of respondent's request for the relief provided by section 8 (f) of the Act is remanded to the Deputy Commissioner for such action as he may deem appropriate.
7. Counsel for claimant shall file a fee petition within 30 days after the date hereof; respondent shall file a reply within 20 days of receipt thereof.

/s/ Steven E. Halpern
STEVEN E. HALPERN
Administrative Law Judge

Dated: May 13, 1986
San Francisco, California

APPENDIX F

COMPENSATION FOR DISABILITY

Sec. 8 Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66-2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66-2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66-2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing of one ear, fifty-two weeks.

(B) Compensation for loss of hearing of both ears, two hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in this class of disability, the compensation shall be 66-2/3 per centum of the difference between the average weekly wagse of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability.

(22) In any case in which there shall be a loss of, or loss of use of more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be 66-2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment.

(d) (1) If an employee who is receiving compensation for permanent partial disability pursuant to section 8(c)(1)–(20) dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower.

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares,

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares.

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 9(d) (other than a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in section 9(d), but if the aggegate amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 9, the total amount of any award for permanent partial disability pursuant to section 8(c)(1)–(20) unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under section 8(c)(21), if there be no survivors as prescribed in this section, then the compensation payable under the subsection shall be paid to the special fund established under section 44(a) of this Act.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for aperiod exceeding five years.

(f) Injury increasing disability:
(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of section 8(c)(1)–(20), the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13), the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of 8(c)(1)–(20), the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13), the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater

than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation for one hundred and four weeks only.

(2) (A) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 44, except that the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 32(a).

(B) After cessation of payments for the period of weeks provided for in this subsection, the employer or carrier responsible for payment of compensation shall remain a party to the claim, retain access to all records relating to the claim, and in all other respects retain all rights granted under this Act prior to cessation of such payments.

(3) Any request, filed after the date of enactment of the Longshore and Harbor Workers' Compensation Amendments of 1984, for apportionment of liability to the special fund established under section 44 of this Act for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may

be expected to be totally or partially incapacitated for a remunerative occupation and who under the direction of the Secretary as provided by section 39(c) of this Act, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 44.

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity toi earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

(i)(1) Whenever the parties to any claim for compensation under this Act, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability for any employer, carrier, orboth for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

(2) If the deputy commissioner disapproves an application for settlement under paragraph (1), the deputy commissioner shall issue a written statement within thirty days containing the reasons for disapproval. Any party to the settlement may request a hearing before an administrative law judge in the manner prescribed by this Act. Following such hearing, the administrative law judge shall enter an order approving or rejecting the settlement.

(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both. Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

(4) The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

(j)(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who —

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings, and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

No. 90-515

In the Supreme Court of the United States

OCTOBER TERM, 1990

LOCKHEED SHIPBUILDING COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

An employee covered by the Longshore and Harbor Workers' Compensation Act was injured in a work-related accident and was properly receiving total disability benefits. The question presented is whether the court of appeals was correct in holding that the employee was entitled to receive continued total disability benefits until the date when suitable alternative employment was available, and that the employer has the burden of showing such availability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 909 F.2d 1256. The decision and order of the Benefits Review Board (Pet. App. 11a-18a) is reported at 22 Ben. Rev. Bd. Serv. (MB) 155. The decision and order of the administrative law judge (Pet. App. 25a-32a) and his orders on reconsideration (Pet. App. 18a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1990. The petition for a writ of certiorari was filed on September 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 908, identifies four different categories of disability—permanent total, temporary total, permanent partial, and temporary partial—and separately prescribes the method of compensation for each. This case involves an employee who, the parties agree, was properly awarded temporary total disability benefits for a time after he was injured. When the duration of the employee's disability was determined to have changed from temporary to permanent, the employer contends that he immediately should have received permanent partial disability benefits. The court of appeals instead concluded that the employee was entitled to permanent total disability benefits for almost three years, and then was entitled to permanent partial disability benefits.

Sections 8(a) and 8(b) deal with permanent and temporary total disabilities, respectively, and provide in substance that an employee will receive two-thirds of his preinjury weekly wage while he is totally disabled. See *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 273-274 & n.8 (1980) (*Pepco*); Pet. App. 5a n.1. An employee who is permanently partially disabled is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired, if (as in this case) his in-

jury is of a kind specifically identified in the schedule set forth in Section 8(c)(1)-(20). 449 U.S. at 269; Pet. App. 5a n.1.

2. Petitioner Lockheed Shipbuilding Company employed respondent Wilborn K. Stevens as a shipscaler until he injured his right arm in May 1981, in a work-related accident. Pet. App. 4a, 12a. Since Stevens was unable to perform his regular job duties, his employer began to make temporary total disability payments to him pursuant to Section 8(b) of the LHWCA. Pet. App. 5a. On November 29, 1982, after extensive medical treatment including two surgeries, Stevens' physician determined that nothing more could be done for his medical condition; in worker's compensation parlance, he had reached "maximum medical improvement." *Id.* at 5a, 12a. On February 6, 1983, the physician determined that Stevens had a 20% functional impairment of his arm that significantly restricted physical activities. *Id.* at 12a. The medical determinations that Stevens had attained maximum medical improvement, but was still disabled, rendered him permanently rather than temporarily disabled.

While agreeing that Stevens' disability became permanent after he attained maximum medical improvement, the parties dispute whether he was totally or partially disabled at that time. In light of the physician's determination of a 20% disability, Lockheed stopped making temporary total disability payments in February 1983 and began paying Stevens scheduled benefits for a permanent partial disability. Stevens asserted, however, that he was not able to return to work and was therefore entitled to total disability benefits under the Act. Pet. App. 26a.

3. In December 1985, an administrative law judge conducted a hearing regarding whether and when

Stevens' total disability had become a partial disability. Stevens indisputably met his initial burden of proof by showing that he was unable to perform his former job duties due to his work-related injury. Pet. App. 26a-27a. Applying established law, the ALJ noted that a finding of total disability was "compelled" by the claimant's proof in the absence of a "showing of suitable available alternative work." *Id.* at 27a. However, relying on the report and testimony of Lockheed's vocational expert, the ALJ found that the employer had carried its burden of showing that Stevens was capable of working as a cashier at a convenience food store or as a cashier at a self-service gas station. *Id.* at 5a, 27a.

As for Lockheed's further burden of showing when these jobs were available to Stevens, the ALJ found that Lockheed demonstrated that these jobs were available as of September 30, 1985, "*but not before.*" Pet. App. 27a, 30-31a. The ALJ ruled that Stevens was entitled to total disability benefits until September 30, 1985, and to partial disability benefits thereafter. *Id.* at 5a, 19a-20a.

On Lockheed's motion for reconsideration, the ALJ rejected the employer's argument that the claimant should be considered permanently partially disabled as of the date his injury reached maximum medical improvement, rather than as of the date there was suitable alternative employment. The ALJ reasoned that maximum medical improvement relates to whether a disabled employee's condition is temporary or permanent, but "has nothing to do with" whether the disability is partial or total. Pet. App. 22a.

4. The Benefits Review Board did not disturb the ALJ's factual finding that the employer had failed to establish the existence of any suitable alternative employment before September 30, 1985. It nonethe-

less ruled that, under its previous decision in *Berkstresser* v. *Washington Metropolitan Area Transit Authority*, 16 Ben. Rev. Bd. Serv. (MB) 231 (1984), "permanent partial disability commences on the date of maximum medical improvement even if it is based on a later showing of suitable alternative employment." Pet. App. 15a. Accordingly, the Board held that Stevens was not entitled to total disability benefits from November 1982, when he attained maximum medical improvement, to September 1985, when, as Lockheed demonstrated, suitable alternative work was available. *Id.* at 5a, 17a.

5. Before the court of appeals, Stevens and the Director of the Office of Workers' Compensation Programs argued that the ALJ had reached the correct result and the Board had erred. The court of appeals agreed and reversed the Board's judgment. Pet. App. 1a-10a. The court held that an employee's "disability becomes partial when suitable alternative employment is or was realistically available to the employee, which must be demonstrated by the employer." *Id.* at 4a. The court rejected the Board's view that a showing of suitable alternative employment is "retroactive" to the date the claimant attained maximum medical improvement: "[U]ntil there is a job that the injured worker can perform, his injury is totally disabling." *Ibid.*

In reaching this result, the Court noted that LHWCA cases make clear that an injured employee has the initial burden of demonstrating that a work-related injury prevents him from performing his job. Pet. App. 6a. At that point, it is also well-established that the burden shifts to the employer to demonstrate that there is suitable alternative work available to the employee; if that burden is not met, the

employee is considered totally disabled. *Id.* at 6a. This burden, the court explained, requires proof that the employee is capable of performing specified work that is actually available. *Id.* at 6a-7a. The court thus concluded that Lockheed carried its burden of proving that Stevens' disability became partial only as of the date it showed the existence of suitable alternative employment.

The court further noted that the statutory terms "total" and "partial" relate to "the *degree* of the disability," while the terms "temporary" and "permanent" relate to the "*nature* (or duration) of disability." Pet. App. 7a. "This differentiation," the court said, "leads us to find maximum medical improvement to be an indication of permanent versus temporary disability and availability of suitable alternative employment to be an indication of partial versus total disability." *Id.* at 7a-8a.

The court further concluded that "[t]he statutory definition of 'disability' supports using the date of available suitable alternative employment as the indicator for when total disability becomes partial." Pet. App. 8a. "[D]isability" is defined in terms of "incapacity * * * to earn" (33 U.S.C. 902(10)), and thus, in the court's words, "encompasses an economic, wage-earning aspect." Pet. App. 8a. The incapacity "*to earn* is a result not of the permanent or temporary character of the disability, but the total or partial character of the disability." *Ibid.* The court noted that the Board's view "that a disability changes from total to partial at the same time it changes from temporary to permanent, advances the medical aspect of the disability while ignoring its economic aspect—the degree of the disability." *Id.* at 9a. The court found no statutory basis for confusing the medical and economic components or for assuming,

as the Board did, that alternative suitable employment was available to Stevens on the date of maximum medical improvement. *Ibid.*

Finally, the court noted that nothing in its ruling precludes employers from establishing "that there was suitable alternative available work at the time of maximum medical improvement, even several years after that point." Pet. App. 9a-10a. Citing cases in which employers had established job availability as of an earlier date, the court concluded that an employer's job survey can be used to establish employment opportunities at a prior date. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. Lockheed does not assert, nor could it, that the court of appeals' precise holding conflicts with any judicial decision. As the court of appeals explained (Pet. App. 7a), the question it resolved regarding the exact point at which a temporary total disability becomes a permanent partial disability was "left unanswered by the existing case law." Although the specific issue was a matter of first impression in the courts of appeals, the holding below follows directly from accepted Longshore Act principles.

The court below relied upon well established burdens of proof applicable to Longshore Act disability claims. Once an employee establishes that he is unable to perform his regular job duties because of an employment-related injury, that employee is presumed to be totally disabled unless the employer demonstrates the availability of suitable alternative em-

ployment. Pet. App. 16a; *Hairston* v. *Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Lentz* v. *Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. Cir. 1984); *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).[1] In order to discharge this burden, the employer must show that the employee is medically capable and otherwise qualified to perform reasonably available jobs. *Hairston*, 849 F.2d at 1196; *McBride* v. *Eastman Kodak Co.*, 844 F.2d 797, 798-799 (D.C. Cir. 1988); *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d at 1042; *American Mut. Ins. Co.* v. *Jones*, 426 F.2d 1263, 1266 (D.C. Cir. 1970).

The court of appeals' ruling is, at bottom, a particularized application of the accepted principle that an employer has the burden of affirmatively proving availability of alternative employment. The court simply refused to "assume[]," as the Board did, that jobs shown to be available to Stevens in September 1985 were also available in November 1982, the date he attained maximum medical improvement. Pet. App. 9a.[2]

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[1] The First Circuit deviated somewhat from this paradigm for reasons not applicable to typical LHWCA cases like this one. See *Air America, Inc.* v. *Director, OWCP*, 597 F.2d 773, 779-780 (1979) (burden to establish suitable alternative employment did not shift to employer where former pilot, who was college trained and had a broad range of administrative and supervisory skills, no longer had the requisite degree of coordination necessary to be a pilot, but the deficiency did not "indicate an inability to perform other work").

[2] While asserting no direct conflict, petitioner argues (Pet. 9) that the decision below disregards "policies enacted by this Court" in *Pepco*. However, nothing in the decision below

2. Petitioner's assertion (Pet. 7-9) that the decision below conflicts with the language of the statute is incorrect. The court of appeals rejected the Board's use of maximum medical improvement as the touchstone of partial disability precisely because that result collided with the statute's differentiation between the nature and the degree of the disability. An injured employee's unresponsiveness to additional medical treatment is relevant to classifying a disability as permanent rather than temporary but does not aid in determining whether a disability is total rather than partial. The court's decision is supported by the statutory definition of "disability," which includes an economic component relating to wage-earning capacity that was ignored by the Board's decision to focus exclusively on maximum medical improvement. Pet. App. 8a-9a.

Petitioner's claim (Pet. 7-9) that the decision below conflicts with the "plain language" of Section 8(c)(1) is unavailing. Section 8(c)(1) provides that permanent partial disability benefits "shall be

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undermines Congress's purpose to provide "prompt and certain recovery for * * * industrial injuries." 449 U.S. at 282. The Court held in *Pepco* that employees who are permanently partially disabled by an injury specified in the schedule at Section 8(c)(1)-(20) must be awarded compensation under the relevant provision pertaining to their injury; they may not elect to claim an award for permanent partial disability under Section 8(c)(21) based on a loss of wage earning capacity applicable to other injuries. 449 U.S. at 270; see also *supra*, note 1. Under the decision of the court of appeals, Stevens is entitled to permanent total disability benefits to the date that, as shown by Lockheed, suitable work was available to him, and to permanent partial disability benefits (paid according to the schedule in Section 8(c)) after that date.

in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e)." Lockheed reads the subsection (Pet. 7) as saying that "*only* temporary disability compensation 'shall be in addition' to permanent scheduled disability benefits." But the statute does not include the word "only," the word Lockheed italicizes in making its plain language argument. Thus, the statute simply does not say what Lockheed contends it plainly says. On the other hand, Section 8(a) specifies that "[i]n case of total disability adjudged to be permanent[,] 66⅔ per centum of the average weekly wage shall be paid to the employee *during the continuance of such total disability*" (emphasis added). In this case, the court applied that language straightforwardly in concluding that Stevens was entitled to total disability benefits until, as shown by the employer, suitable alternative work was available.

Petitioner's position seems to be based on the notion that permanent total disability and permanent partial disability are immutable statuses, and that an employee's condition cannot change from one to the other. Such a theory is in tension with Section 22 of the Act, 33 U.S.C. 922, which permits modification of compensation awards based on changes of conditions. See, *e.g.*, *Director, OWCP* v. *Edward Minte Co.*, 803 F.2d 731, 734-735, 736 (D.C. Cir. 1986) (compensation award properly reopened because of a change in condition from permanent partial disability to permanent total disability). Moreover, it conflicts with the fact that whether a disability is total or partial depends in part on whether suitable alternative employment is available, an economic factor that may change even if a claimant's medical condition does not.

3. Because the holding below follows from well-established Longshore Act principles, petitioner is incorrect in characterizing (Pet. 5, 13) the court of appeals' decision as "creat[ing] a new form of recovery under the * * * Act" or as "significantly alter[ing] th[e] process" by which claims are resolved. See also *id.* at 6. Although petitioner attempts to characterize the Board's holding in this case as reflecting a well-established administrative position, the Board first articulated its position in 1984 in *Berkstresser* v. *Washington Metropolitan Area Transit Authority*, which is currently on appeal to the District of Columbia Circuit. *Director, OWCP* v. *Washington Metropolitan Area Transit Authority and Berkstresser*, No. 89-1473. Indeed, the ALJ in this case deemed the Board's *Berkstresser* decision to be of dubious precedential value because it effected "a dramatic departure from prior case law" without "a detailed rationale" from the Board. Pet. App. 23a. Moreover, the Director of the Office of Workers' Compensation Programs—who is entited to deference on the question—has consistently taken the position endorsed by the court of appeals.[3]

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[3] As the court of appeals noted (Pet. App. 4a), the interpretations of the Benefits Review Board (an adjudicatory, non-policymaker body) are not entitled to deference. *Pepco*, 449 U.S. at 278 n.18. And the clear weight of appellate authority correctly recognizes that the Director rather than the Board is entitled to deference under the LHWCA and the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, because the Director is the administrator and policymaker under these statutes. *Lukman* v. *Director, OWCP*, 896 F.2d 1248, 1250-1251 (10th Cir. 1990); *Newport News Shipbuilding & Drydock Co.* v. *Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *Director, OWCP* v. *Palmer Coking Coal Co.*, 867 F.2d 552, 555 & n.3 (9th Cir. 1989); *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987); *Peabody Coal*

4. Finally, petitioner's speculative arguments regarding the impact of the decision (Pet. 5-7) are exaggerated. For example, petitioner claims (Pet. 6) that the decision below complicates LHWCA cases by making "evidence of the loss of wage earning capacity, for the first time, relevant whenever a claimant sustains a scheduled injury." But the requirement that an employer demonstrate an employee's retention of wage earning capacity only comes into play when an employee asserts that he is totally disabled, and petitioner recognizes that "[v]ery few scheduled injuries are of such severity that they even prompt the allegation of permanent total disability." Pet. 6.

As a practical matter, the court of appeals' holding simply requires that the employer's evidence relating to job availability focus on the time frame during which it believes a claimant's disability status changed from total to partial. Petitioner complains (Pet. 14) that this will unfairly require employers to conduct retrospective employment studies but does

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Co. v. *Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Bethlehem Mines Corp.* v. *Director, OWCP*, 766 F.2d 128, 130 (3d Cir. 1985); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983). But see *Director, OWCP* v. *General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990) (neither the Board nor the Director should receive deference, at least where the Director's position "has not been articulated in a more objective context through the promulgation of regulations"), and *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 287-288 (6th Cir. 1988) (neither the Board nor the Director should receive deference). Thus, even if this case were viewed as presenting conflicting interpretations of the statute, both of which were reasonable, the interpretation of the Director should prevail. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

not justify its conclusion that this result is "unfair." The lower court cited a number of cases (Pet. App. 10a) in which employers successfully demonstrated suitable alternative employment with retrospective labor market surveys.[4]

Petitioner's assertion that employers *cannot* conduct studies of job availability until long after an employee attains maximum medical improvement (Pet. 14) is unsupported. Employers are generally aware of the course of their injured workers' medical treatment and will often be able to gauge when an employee has reached maximum medical improvement. See generally 33 U.S.C. 907. In this case, for example, petitioner ceased paying temporary total disability benefits and started paying permanent partial disability benefits only two months after the claimant's date of maximum medical improvement. Petitioner fails to explain why it did not conduct an employment study at that time, rather than waiting almost three years to do so.

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[4] The courts have placed the burden of proving suitable alternative employment on the employer because it is unfair to require employees to canvas the job market to prove a negative, *i.e.*, that there are no jobs they may perform given their disabilities. *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980). We do not understand petitioner to question this principle in its general application, but only as applied in this specific situation to require the employer to focus its job survey on the time at which it claims a total disability became a partial disability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 90-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

LOCKHEED SHIPBUILDING COMPANY,
Petitioner,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

and

WILBORN K. STEVENS,
Respondents.

BRIEF OF RESPONDENT WILBORN K. STEVENS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties in No. 89-70224 before the Court of Appeals were Wilborn Stevens, as petitioner, and the Director, Office of Workers' Compensation Programs of the United States Department of Labor and Lockheed Shipbuilding Company* as respondents.

*Lockheed Shipbuilding company is a wholly owned subsidiary of Lockheed Corporation.

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I

INTRODUCTION

Respondent Wilborn K. Stevens urges that the Petition of Lockheed Shipbuilding Company for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

II

ARGUMENT

The Petition for Writ of Certiorari should be denied for the following reasons:

A.

The decision of the Court of Appeals does not conflict with the decision of any other United States Court of Appeals on the same matter, nor decide a federal question in a way that is in conflict with a state court of last resort.

Lockheed Shipbuilding Company, Petitioner, (hereinafter "Employer") has not argued that the decision of the Court of Appeals below is conflict with either any other Court of Appeals, or a state court of last resort on a federal question. In fact, this is the first decision of any Court of Appeals to address this specific issue.

It is noteworthy that of all of the reported decisions that have addressed the issue of nature and extent of disability, there is only one Benefits Review Board Decision that can be cited as direct support for the Employer's position, Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984).

A number of other cases cited by the Court of Appeals, including Williams v. General Dynamics Corp., 10 BRBS 915 (1979) and Thompson v. McDonnell Douglas Corp., 17 BRBS 6 (1984) hold to the contrary, as does the case of Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986).

B.

The Court of Appeals decision is consistent with the clear language of the Longshore and Harbor Workers Compensation Act and the intent of Congress.

The other traditional basis for granting a Petition of Writ of Certiorari as provided by Rule 10 of the Rules of the Supreme Court of the United States is that the decision below departs from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. While the Employer does not directly argue that such is the case, it alleges that the decision of the Court of Appeals has created a new remedy under the Longshore and Harbor Workers Compensation Act, (hereinafter "Act"), which will require extensive administration. As argued below, the decision creates no new remedy and simply reaffirms rights already extended to injured workers by the Act. No other reason exists to justify acceptance of review.

1. The Court of Appeals simply accords to Mr. Stevens those benefits and rights to which he is entitled by the clear language of the Act.

Lockheed Shipbuilding Company, the Employer herein, has asked that Certiorari be granted in order to overturn a decision of the United States Court of Appeals for the Ninth Circuit. In

that decision, the Court of Appeals overturned a decision of the Benefits Review Board, and affirmed the finding of an Administrative Law Judge of the United States Department of Labor. In its Petition for Writ of Certiorari, the Employer argues that the decision of the Court of Appeals creates a new form of recovery under the Act, and the opinion contradicts mandatory statutory language and the intent of Congress. The arguments are not well founded and the Petition should be denied.

The Act provides workers compensation benefits to certain statutorily defined employees such as Mr. Stevens. If the worker is found to be disabled by virtue of a work related injury, certain benefits are awarded, depending on the nature of the disability and its "extent" or "degree".

Disability is defined as follows:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; 33 USC 902 (10).

The nature of the worker's disability depends on whether it is temporary or permanent in nature. The nature of disability is dependent on whether or not the worker has achieved maximum medical improvement, established by medical evidence. Trask v. Lockheed Shipbuilding & Construction Company, 17 BRBS 56, 60 (1985).

The extent or degree of disability refers to whether the employee has sustained a total or partial disability. A determination of whether the worker is partially or totally disabled requires consideration of economic factors in order to

ascertain post-injury wage earning capacity. Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988).

Once an injury has occurred, the worker has the burden of showing the work-relatedness of the injury, and that the injury prevents him from performing his former job. Hairston, supra. If such a showing is made, the burden shifts to the Employer to establish residual earning capacity by showing suitable alternative employment. This burden must be met by pointing to specific jobs that the claimant can perform. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980). A showing of general ability to perform work is not adequate. Hairston, supra, at 1196. Because of this formula for establishing extent of disability, it is a long established principal that disability is "an economic concept based on a medical foundation". Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1334 (9th Cir. 1978), Cert. Denied 440 US 911 (1979).

Section 8 of the Act provides for calculating the amount of disability that shall be paid the injured worker, depending on the nature and extent of the disability. Section 8 provides that for all cases where the worker is shown to be totally disabled, compensation "shall be paid to the employee during the continuance of such total disability ... in accordance with the facts". (Emphasis added). If the disability is partial, then reference is made to §8(c) and payment is made either under the schedule set forth, or, "in all other cases", as provided in §8(c)(21). Regardless of whether the injury is considered to be

"scheduled" or "unscheduled", compensation for permanent total disability is as set forth in §8(a). As described above, permanent total disability is awarded if the Employer fails to meet the burden of showing suitable alternative employment.

In the instant case there was a dispute regarding the extent of disability of Mr. Stevens after he reached maximum medical improvement following what would be considered a "scheduled" disability[1]. While Mr. Stevens had reached maximum medical improvement on November 30, 1982, the Employer did not show suitable alternative employment until much later. At the hearing before the Administrative Law Judge, the Employer produced evidence of jobs that were shown to be available on September 30, 1985 at the earliest. Therefore, the Administrative Law Judge found that the Employer had failed to meet its burden of showing suitable alternative employment until September 30, 1985. Mr. Stevens was found to be permanently and totally disabled from November 30, 1982 until September 30, 1985, at which time he became partially disabled and was awarded compensation under §8(c)(1) for his scheduled injury.

The Employer argued that its showing of suitable alternative employment should be applied retroactively to the date of maximum medical improvement, and Mr. Stevens should be restricted to a permanent partial disability award under the "schedule", regardless of the time at which it met its burden of showing such

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[1]Mr. Stevens had sustained a 30% loss of use of his arm as a result of the work related injury.

employment. The Court of Appeals disagreed and found that the Act required an award to Mr. Stevens of permanent total disability unless and until the Employer's showing of suitable alternative employment was made. It noted that this would not preclude the Employer at a later date from coming forward with evidence of jobs that existed at an earlier time to show suitable alternate employment. The Employer would "merely need to overcome the inherent limitations of credible and trustworthy evidence".

In the instant case, Lockheed did not dispute that Mr. Stevens was temporarily totally disabled through November 30, 1982. At that time his disability changed from temporary to permanent. At the hearing below, Mr. Stevens established that he was unable to return to his previous employment. Having met his burden of showing injury, as well as his inability to perform his former job, the burden shifted to the Employer to show suitable alternative employment. Such a showing was not made until September 30, 1985, almost 3 years after maximum medical improvement. Section 8(a) provides that a totally disabled claimant is entitled to compensation "during the continuance of such total disability". At which time that he was shown to be only partially disabled by virtue of the Employer's labor market survey, Mr. Stevens was then entitled to compensation for his partial disability under §8(c)(1) of the Act.

The Decision of the Court of Appeals, affirming the Administrative Law Judge, resulted in Mr. Stevens being awarded

exactly those rights accorded to him by the Act, no more and no less. The clear language of the Act has been followed by the Court of Appeals. Therefore, the Petition should be denied.

2. The decision imposes no new burden on the employer and creates no new administrative requirements.

The Employer has argued that the Court of Appeals' decision has created a new right and remedy, and that as a result, new and expensive litigation will be required in order to administer this new remedy. The Employer's argument is incorrect on both counts.

Section 8(a) of the Act contains a clear statement that a claimant who is totally disabled, that is, who is unable to return to previous job duties and for whom no showing of suitable alternative employment has been made, is entitled to compensation "during the continuance of such total disability". This is exactly the effect of the Administrative Law Judge's ruling, reinstated by the Court of Appeals.

The Employer attempts to rely on the case of Potomac Electric Company v. Director, OWCP, 449 U.S. 268 (1980) (PEPCO) as holding that permanent total and permanent partial disability are mutually inconsistent when a scheduled injury is involved. The PEPCO decision does not support such a conclusion. Rather, this Court held that in cases involving permanent partial disability, the schedule set forth in §8(c)(21) was the exclusive remedy. PEPCO does not address the issue of whether a total disabled claimant can be retroactively deprived of total disability benefits once the Employer belatedly makes a showing

of residual earning capacity. It only holds that a partially disabled worker with a schedule injury will be limited to benefits under §8(c)(21) for those partial disability benefits.

The Employer likewise argues that administration of this alleged new remedy will be impossible, suggesting that the Court of Appeal's decision places a new burden on the Employer. To the contrary, the Court of Appeals places no more burden on the Employer than already exists, that is, to show suitable alternative employment in order to avoid a finding of total disability once a claimant has demonstrated an inability to return to his previous employment.

The Employer suggests, however, that it was the Claimant's burden of proving his permanent and total disability. ("Unless the Claimant attempted to prove he was permanent and totally disabled ...", pg. 6, Petition for Writ of Certiorari). To the contrary, the Claimant has no burden of proving permanent total disability. The Claimant only has to show a work related injury and an inability to return to his previous employment in order to enjoy the benefit of a presumption that he was permanently and totally disabled. If an Employer fails to take the necessary steps to show suitable alternative employment, whether through a labor market survey or other means, it takes the risk that the Claimant will be awarded total disability benefits. This risk is the same whether the Claimant has sustained a scheduled or unscheduled injury. The Employer has always had the burden of

proving suitable alternative employment. The only question addressed by the Court of Appeals is whether an Employer who belatedly meets that burden will be allowed to have it relieved retroactively.

Since no new remedy has been created by the Court of Appeals decision, it is obvious that there is no new burden of administration. As a matter of policy, Congress has placed certain burdens imposed in the administration of the Act on those best able to bear them. This is the reason that the burden has been put on the Employer to show suitable alternate employment. Bumble Bee Seafoods, supra, 1329.

III

CONCLUSION

There is no conflict among the decisions of other Courts of Appeal with the instant opinion that would justify accepting certiorari in this case, nor has the Court of Appeals so far departed from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision. A petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor. Rule 10. The opinion of the Court of Appeals is consistent with the clear language of the Act. The interpretation urged by the

Employer would contradict this clear language as well as the intent of Congress. For all those reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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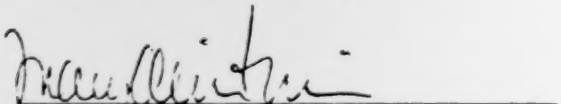

Mary Alice Theiler

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